No. 287

In the Supreme Court of the United States

OCTOBER TERM, 1948

JOHN BARR, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Customs Court (R. 112–118) is reported in 79 Treasury Decisions Advance Sheets, August 12, 1943, p. 14. The opinion of the Court of Customs and Patent Appeals (R. 120–128) is reported in 79 Treasury Decisions Advance Sheets, July 6, 1944, p. 28.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on May 22, 1944 (R. 128). The petition for a writ of certiorari was filed on July 26, 1944. The jurisdiction of this

Court is invoked under Section 195 of the Judicial Code, as amended (28 U. S. C. 308).

QUESTION PRESENTED

On March 25, 1940, and thereafter, including May 3, 1940, the Federal Reserve Bank of New York, purporting to act under Section 522 (c) of the Tariff Act of 1930, certified daily to the Secretary of the Treasury two buying rates for converting English pounds sterling into United States dollars, one designated as the "free" rate, the other, which was somewhat higher, designated as the "official" rate. The Secretary of the Treasury directed the various collectors of customs to use the "official" rate in converting pounds into dollars for customs duty purposes when the "official" rate varied by more than five per centum from the rate proclaimed by the Secretary under Section 522 (b) of the Tariff Act of 1930. The question presented is:

> Whether the action of the Secretary of the Treasury in directing the collectors of customs to use only the "official" rate was within his authority and not subject to judicial review.

STATUTE INVOLVED

Section 522 of the Tariff Act of 1930 (46 Stat. 590, 739–740, 19 U. S. C. 1522) provides:

> (a) VALUE OF FOREIGN COIN PROCLAIMED BY SECRETARY OF TREASURY.—Section 25 of

the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended, is reenacted without change as follows:

"SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year."

(b) PROCLAIMED VALUE BASIS OF CONVERSION.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the date of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) MARKET RATE WHEN NO PROCLAMATION.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a

value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

STATEMENT

Coincident with the outbreak of the present war between Great Britain and Germany, the British Government inaugurated an elaborate system for controlling foreign exchange through a series of orders and regulations which, among other things, required all persons resident in the

United Kingdom to sell to the British Treasury at prices fixed by it all foreign currency which they were entitled to sell, and prohibited, with a few exceptions, the exportation of foreign currency from the United Kingdom, and the purchase and sale of foreign currency in the United Kingdom from or to any person other than an authorized dealer in such currency, at prices to be fixed by the British Treasury (R. 74–75, 78–100). On March 7, 1940, an order, effective March 25, 1940, was issued by the British Government wherein it was provided that certain classes of merchandise (not including woolen cloth) might be exported from the United Kingdom to the United States and several other countries, only when payment therefor had been made to persons resident in the United Kingdom in the currency of the respective countries, or in English pounds purchased in the United Kingdom after September 3, 1939, from an authorized dealer in foreign currency[1] (R. 75, 100–102).

Under date of March 19, 1940, the Federal Reserve Bank of New York notified the Secretary of the Treasury that, beginning March 25, 1940, and because of the British order of March 7, 1940, it would certify to the Secretary of the Treasury pursuant to Section 522 (c) of the Tariff Act

[1] Subsequent to the exportation of the merchandise involved in the case at bar, this order was amended, effective June 10, 1944, to include merchandise of any class or description (R. 104).

of 1930, *supra*, pp. 3–4, two rates for the English pound sterling, one to be designated as the "free" rate, and the other as the "official" rate, the latter being the rate fixed by the British Treasury (R. 76, 107–108). On April 15, 1940, the Secretary of the Treasury directed the collectors of customs (T. D. 50134, 75 Treasury Decisions, 370–371; 5 Fed. Reg. 1447) to use the "official" rate for the purpose of assessing and collecting duties on imported merchandise when that rate varied by more than five per centum from the rate proclaimed by the Secretary under Section 522 (b) of the Tariff Act of 1930, *supra*, p. 3 (R. 122–123). Thereafter, on May 3, 1940, the petitioner caused to be exported from Scotland certain woolen cloth (R. 11, 31), which was imported into the United States at the port of New York on May 13, 1940 (R. 5–6). Payment for the merchandise was made with pounds purchased through the Guaranty Trust Company of New York in the New York market for cable transfer on May 22, 1940, at $3.21 (R. 76–77). On the date the merchandise was exported from Scotland, the Federal Revenue Bank of New York certified to the Secretary of the Treasury that on that day the "free" rate for the English pound was $3.475138, and the "official" rate $4.035000 (R. 109). The Secretary of the Treasury, in conformity with his directions of April 15, 1940, to the collectors of customs, published

only the "official" rate (T. D. 50146, 75 Treasury Decisions 389) (R. 123). The woolen cloth was invoiced, entered, and appraised in English pounds, and since the "official" rate on the date of exportation varied by more than five per centum from the proclaimed rate for the quarter in which the goods were exported (R. 76), the collector of customs, as directed by the Secretary, used the "official" rate instead of the proclaimed rate in converting the English pounds into United States dollars for the purpose of assessing and collecting duties thereon (R. 6).

The petitioner filed a protest against the manner in which the collector of customs liquidated the entry (R. 5–6), and at the trial of the case counsel for the petitioner contended that the action of the Secretary of the Treasury in directing the collector of customs to use the "official" rate only was beyond the Secretary's legal authority; that the "free" rate was the only rate which could be legally used in converting English pounds into United States dollars in connection with the merchandise involved in the case at bar; and that the failure of the collector to use the "free" rate rendered illegal his assessment and collection of duties on the merchandise in excess of the amount which the use of the "free" rate would have required[2] (R. 32–33).

[2] There is no controversy concerning the value of the woolen cloth in English pounds or the tariff classification under which the cloth should fall (R. 10, 31).

ARGUMENT

The court below followed the rule that orders and proclamations issued by the Secretary of the Treasury governing the rates to be used in converting foreign currencies into United States dollars for customs duty purposes are not subject to judicial review if on their face they conform to the statute involved. This rule, which was established long ago by this Court, has been reiterated from time to time. *Cramer* v. *Arthur*, 102 U. S. 612; *Hadden* v. *Merritt*, 115 U. S. 25; *United States* v. *Klingenberg*, 153 U. S. 93; *United States* v. *Whitridge*, 197 U. S. 135.

The United States Customs Court sustained the protest (R. 118–119), holding that the Federal Reserve Bank had authority under Section 522 (c) of the Tariff Act of 1930, *supra*, pp. 3–4, to certify two rates for a single currency; that the action of the Secretary in directing the collector to use only the "official" rate was beyond the scope of his powers; and that it was the duty of the collector to use the "free" rate for the reason that merchandise of the kind involved in the case at bar did not fall within the terms of the British order in effect on the day of exportation, which required that payments for certain exports be made in United States dollars, or in pounds sterling purchased in the United Kingdom from an authorized dealer at the "official" rate of exchange (R. 112–118).

The Court of Customs and Patent Appeals reversed the judgment of the Customs Court on the grounds that Section 522 (c) of the Tariff Act of 1930, *supra*, pp. 3–4, contemplates the finding of a single buying rate of exchange; that the "official" rate was the all-inclusive buying rate for pounds; that the direction given by the Secretary to the collector to use the "official" rate, on its face, conformed to the law; and that, under the established rule, the correctness of the Secretary's direction to the collector was accordingly not subject to judicial inquiry (R. 120–129). The reasons which necessitated the adoption of the rule were stated by this Court to be the prevention of "utter confusion and uncertainty" in connection with the assessment of duties on imported merchandise. *Cramer* v. *Arthur*, 102 U. S. 612, 619.

Petitioner asserts, in effect, that the above-mentioned rule is not applicable to this case, and contends that Section 522 (c), *supra*, pp. 3–4, contemplates the finding and certification by the Federal Reserve Bank of a plurality of buying rates for a single currency; that it was the duty of the Secretary of the Treasury to publish both of the rates certified by the Bank; and that it was incumbent upon the collector of customs, subject to judicial review, to select and use the rate properly applicable to the particular case (Pet. 6–9).

Under the holding of the court below, the above-mentioned rule is applicable to the case at bar because Congress, when enacting Section 522 (c)

did not contemplate, as the terms of that Section disclose, the finding of more than one buying rate for a single currency, and did not, therefore, intend to change the legislative policy, which has existed throughout the greater part of the life of the nation, that rates of exchange established by findings and proclamation of executive officers should be final and binding on importers and collectors of customs, and should not be subject to judicial review, except to inquire whether the action of the executive officer on its face conformed to the statute involved. This construction of the Section is reasonable. There is no language in the Section to indicate that Congress intended that more than one buying rate for a single currency should be used for customs duty purposes or that questions concerning rates of exchange, which had been withheld from litigation throughout the life of the nation, should be thrown into the courts, and we have found nothing in the legislative history of the Section from the time it first appeared in the law as Section 403 (c) of the Emergency Tariff Act of 1921 (42 Stat. 9, 17), to suggest that the Congress had such innovations in mind.

The comparable provision of law which was in effect immediately prior to the enactment of the original version of Section 522 (c), *supra*, pp. 3–4, as Section 403 (c) of the Emergency Tariff Act of 1921, was found in the proviso to Section 25 of the

Act of August 27, 1894, 28 Stat. 552, and read as follows:

> *Provided,* That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred.

The purpose of the change in the law is clear. Violent fluctuations in the value of foreign currencies following the first World War rendered inadequate the cumbersome method of handling depreciated foreign currency conversion through the reliquidation of entries ordered by the Secretary of the Treasury. Something more expeditious was necessary. A regular daily publication by the Secretary of the value of each foreign currency would permit the handling of currency conversion in connection with customs matters with the desired celerity and dispatch, and it was considered that the Federal Reserve Bank of New York was more favorably situated than the Secretary of the Treasury for obtaining the necessary information concerning daily currency values without delay. Thus, the paramount purpose of the change in the law was to eliminate, so far as possible, inade-

quacies and delays in the administration of the customs laws caused by a rapidly changing money market. Manifestly, this purpose is inconsistent with an intention to confuse and retard customs procedure by permitting plural rates of exchange for a single currency. It is likewise inconsistent with an intention to expand judicial procedure in customs cases by permitting importers to litigate questions which theretofore they had not been given the privilege of litigating.

A consideration of the results which might flow from the adoption of the construction contended for by petitioner sharply emphasizes the soundness of the construction placed on Section 522 (*c*) by the court below. For example, a construction which would permit the finding of a plurality of rates of exchange for a single currency might produce results seriously inimical to proper administration of the customs laws. If the statute permits the finding of two rates, obviously it permits the finding of any other number of rates for a single currency of any foreign country. Under the circumstances, "confusion and uncertainty" (*Cramer* v. *Arthur*, 102 U. S. 612, 619) would be inevitable, as the court below recognized (R. 127). In fact, any foreign country could control, to a large extent, the amount of duties to be paid on its exports to the United States by fixing the rates of exchange at which, and providing the conditions under which, its currency could be purchased for the purpose

of paying for such exports. Conceivably, situations could exist where a different rate might be found for every principal class of merchandise. Thus, collectors of customs would be faced not only with the burdensome task of obtaining evidence on rates of exchange from foreign countries in thousands of cases before they could attempt to liquidate entries of imported merchandise, but they would be required in many instances to interpret and construe foreign laws and orders in order to determine under what classification any given article of merchandise would fall for rate of exchange purposes. We believe that a construction which would permit findings of plural rates of exchange is incorrect, and should not be placed upon legislation which bears no express word or implication that Congress intended to expand the judicial procedure in connection with the litigation of customs claims against the United States or to revise completely the fundamental and long-existing process for administering the conversion of foreign currency for customs duty purposes.

The holding of the court below which sustained the action of the Secretary of the Treasury in selecting and publishing the "official" rate, is valid. The very phraseology of Section 522 (c), *supra*, pp. 3–4, reveals that one buying rate is envisaged. Since it is obvious that the market is ordinarily for unrestricted currency, it is only logical to conclude that "the buying rate" refers

to the buying rate for such currency. As stated by the court below, the "official" rate was the all-inclusive buying rate (R. 127), for it was the sole buying rate at which English pounds could be purchased either in New York or Great Britain for all purposes and with no restrictions upon their use. It follows that the "official" rate was "the buying rate" contemplated by Section 522 (c). Because the Federal Reserve Bank certified one buying rate which conformed to the statute, and one which did not conform to the statute, the action of the Secretary in selecting the rate which conformed to the statute was not arbitrary, and for the same reason his action did not encroach upon the power delegated by Congress to the Federal Reserve Bank.

CONCLUSION

The decision of the court below is correct, and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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